Nos. 87-363 and 87-364

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Petitioners,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

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MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Interstate Natural Gas Association of America ("INGAA")[1] hereby moves for leave to file the accompanying brief *amicus curiae* in the captioned matter. This motion is being filed in accordance with this Court's Rule 36.

INGAA, as an organization representing virtually all of the major interstate natural gas transmission companies, has a strong interest in this proceeding and has been actively involved in this case since the Tenth Circuit's decision. In that decision and Judgment, the Tenth Circuit reversed the Federal Energy Regulatory

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[1] The member companies of INGAA are listed in the attached appendix to this brief.

Commission's (Commission) interpretation of Section 121 of the Natural Gas Policy Act of 1978 (NGPA) and imposed its own interpretation in lieu of the Commission's, causing substantial adverse impact upon interstate pipelines and the natural gas consumers which they serve.

Because of the substantial adverse impact of the Tenth Circuit's decision, INGAA filed a motion on September 21, 1987 for leave to file a brief *amicus curiae* in support of the petition for a writ of *certiorari* which had been filed by the Commission. These motions became necessary because six of the parties to this case had not consented to INGAA's participation in these proceedings; all of the remaining parties had consented in INGAA's *full* participation.[2] By an unpublished order entered November 30, 1987, INGAA's motion to file its brief *amicus curiae* in support of the petition for a writ of *certiorari* was granted.

In its earlier motion, INGAA set forth fully the facts showing the industry-wide importance of this case and the nature of INGAA's interest in it. INGAA will not repeat all of that discussion here, but respectfully refers the Court to that prior motion. However, it is especially important to emphasize two factors demonstrating that this motion should also be granted: (i) INGAA's interest, as a representative of virtually all major interstate pipelines, is obviously not identical to the regulators' interest of the Commission or the Public Service Commission of the State of New York (Petitioner in No. 87-364) even though INGAA supports the Commission's interpretation of the NGPA before this Court; and (ii) it was not until the Tenth Circuit imposed its own interpretation of NGPA Section 121 upon the Commission and the Commission and the natural-gas pipeline industry that INGAA's interests were adversely impacted.

The industry-wide importance of this case and INGAA's strong interest in its outcome have not abated since the Court granted INGAA's motion. Indeed, if anything, that interest has grown stronger because the higher gas costs which will result from the Tenth Circuit's erroneous decision continue to accrue. The same factors which justified granting INGAA's motion for leave to file its prior brief *amicus curiae* also warrant the Court granting the instant motion for leave to file the attached brief *amicus curiae* on the merits.

The Commission order under review herein is a generic rulemaking order which, if modified as ordered by the Tenth Circuit, will have a widespread impact on many of the pipeline industry participants. Due to its broad membership base, INGAA will be able to offer the Court a perspective on this case which may be broader than the narrow parochial interests of the individual private parties.

WHEREFORE, for the reasons stated above, and for the reasons stated in INGAA's motion for leave to file its brief *amicus curiae* in support of the petition for a writ of *certiorari*, INGAA respectfully prays that this Court receive the attached brief *amicus curiae* for filing.

Respectfully submitted,

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[2] Copies of the letters evidencing that consent have previously been lodged with the Clerk of the Court. INGAA has not made any further attempts to obtain the consent of the six parties who have previously refused since any such effort would obviously be futile.

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BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Interstate Natural Gas Association of America ("INGAA"), in accordance with this Court's Rule 36, has received the written consent of several of the parties to participate fully in this case as *Amicus Curiae*. Copies of these consent letters have been filed with the Clerk.[1]

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[1] Even though this case is of industry-wide importance, certain gas producer-respondents declined to give their consent to INGAA's participation when INGAA sought to file a brief *amicus* in support of the Commission's petition for writ of *certiorari* to the Tenth Circuit. That INGAA brief *amicus* was subsequently accepted for filing by this Court (see "Motion of Interstate Natural Gas Association of America for Leave to File Brief as *Amicus Curiae* in Support of Petitioners", attached, *supra*).

This brief is in support of the Petitioners, the Federal Energy Regulatory Commission ("Commission") (No. 87-363), Public Service Commission of the State of New York, Panhandle Eastern Pipeline Company, Tennessee Gas Pipeline Company, and Associated Gas Distributors (No. 87-364). For the reasons appearing below, INGAA prays that the Judgment of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *Martin Exploration Management Company, et al. v. Federal Energy Regulatory Commission*, 813 F.2d 1059 (Nos. 84-2756, *et al.*, 10th Cir., decided March 9, 1987, as modified on May 1, 1987), be reversed. App. 1a.[2]

INTEREST OF THE AMICUS CURIAE

INGAA is a nonprofit national association whose members represent virtually all of the major interstate natural gas transmission companies operating in the United States. INGAA's members (listed in the appendix attached to this brief) account for over 90% of all natural gas transported and sold for resale in interstate commerce, and they are subject to the jurisdiction of the Commission under various provisions of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717, *et seq.*; the Department of Energy Organization Act, 42 U.S.C. §§ 7101, *et seq.*; and the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301, *et seq.* The decision of the Tenth Circuit is not consistent with the clear intent and meaning of the NGPA as interpreted by this Court and, unless reversed, will result in substantial prejudice to interstate pipelines and ultimate consumers of natural gas.

STATEMENT OF THE CASE

This case involves Commission rules relating to dual-category gas, *i.e.*, gas which is qualified under an NGPA pricing category and is also qualified for deregulation

[2] "App." refers to the Appendix to the Commission's petition for a writ of *certiorari* filed in No. 87-363 on August 31, 1987.

under NGPA Section 121. The Commission's orders implement NGPA Section 121 which states that "the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall . . . cease to apply effective January 1, 1985." The Commission, applying Section 121, held that the provisions in that section expressly deregulating one of the two categories must result in the treatment of the subject gas as deregulated under the statute.[3]

The Commission rejected arguments that its interpretation of Section 121 conflicts with NGPA Section 101(b)(5).[4] The Commission concluded that Section 101(b)(5), which states that for dually-qualified gas "the provision [of Title I—Wellhead Pricing] which could result in the highest price shall apply," does not override the express deregulation mandate of Section 121. The Commission read Section 101(b)(5) as referring to the price resulting from deregulation and not to the price effective under the regulated pricing category in which dual-qualified gas has been qualified. The Commission reached this conclusion based upon the finding that the deregulated price "could result in the highest price" because that price is subject to no legal limitation and the parties "could" always negotiate a price higher than the regulated ceiling price.

In summary, the Commission concluded that NGPA Sections 121 and 101(b)(5) are to be applied independently of private contracts, on the ground that "whether

[3] "Deregulation appears to be mandatory. Producers cannot opt out of the statutory scheme on January 1, 1985, merely because market conditions are unfavorable." App. 76a.

[4] "(5) SALES QUALIFYING UNDER MORE THAN ONE PROVISION. —If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable." 15 U.S.C. 3311(b)(5).

the *contract* allows the producer to collect a price higher than a regulated price is a contractual issue, not an issue raised by the deregulation scheme of the NGPA." App. 111a (footnote omitted). In the Commission's view, private contracts should not control whether first-sale gas is regulated or deregulated; rather, the statute should control.

Reversing the Commission's construction of the statute, the Tenth Circuit agreed that the Commission's interpretation of NGPA Section 121 would be reasonable, standing alone:

> "We conclude that § 121 is ambiguous. Therefore, in the absence of another provision in the statute, FERC's determination that dual category gas is to be considered deregulated would be a reasonable interpretation of the ambiguous language of § 121." 813 F.2d at 1066; App. 11a.

However, the Court went on to hold that the Section 101(b)(5) phrase "could result in the highest price" *must* be read as referring to the highest price resulting from *actual market conditions at each particular moment*. 813 F.2d at 1068; App. 16a. This finding, which is the linchpin of the Tenth Circuit's rationale, fails to accept and give weight to the meaning which the Commission explicitly ascribed to the phrase, *i.e.*, that, in the case of dually-qualified gas, the "highest price" to which Section 101(b)(5) refers is the legally unrestricted, deregulated price.

SUMMARY OF ARGUMENT

1. The Tenth Circuit's interpretation is inconsistent with the purpose and history of the NGPA. The NGPA redefined and replaced the NGA cost-based standard with higher "just and reasonable" price ceilings for "first-sale" gas and, thereafter, with phased-in deregulation through elimination of the statutory ceilings. Those ceilings, and the subsequent deregulation provisions of

NGPA Section 121, were included in light of the ultimate statutory goal of using market forces to *balance* the supply and demand for natural gas. *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 106 S. Ct. 709, 716 (1986) ("*Transco*"). The Commission's interpretation of NGPA Section 121 to deregulate dual-qualified gas is consistent with this overriding statutory objective. The Tenth Circuit's forced interpretation of the NGPA plainly is not.

To achieve the *desideratum* of a gas supply and demand balance, Congress in NGPA Section 121 made most of these NGPA price ceilings temporary.[5] In the short run, they would serve as incentives to the extent that they permitted prices to rise above cost-based levels of the NGA; but they would also serve as limits upon the operation of free market forces to the extent that those forces continued to warrant higher prices. In the longer run, the ceilings were to be phased out, to be replaced by market forces altogether—the ultimate goal.

The Tenth Circuit's interpretation turns the congressional intent on its head because it makes price *floors* of the congressionally prescribed price *ceilings* and extends regulation in the face of a clear congressional intent to deregulate.

2. The Tenth Circuit imposed its own interpretation of the statute upon the Commission and the natural gas industry while conceding that its interpretation pro-

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[5] As this Court explained previously in its *Mid-La II* opinion:

> "For some categories of gas, the NGPA ceiling prices are an intermediate step on the path from a fully regulated industry to a deregulated industry. Sections 121 and 122 of the NGPA provide a mechanism for the ultimate decontrol of a number of categories of natural gas."

Public Service Commission of the State of New York v. Mid-Louisiana Gas Co., 463 U.S. 319, 336 n.14 (1983).

duces "an anomaly in the operation of the NGPA in certain circumstances * * *." 813 F.2d at 1069 n. 11; App. 17a. Indeed, the Tenth Circuit *twice* conceded that its interpretation produces such anomalies. 813 F.2d at 1071; App. 23a.

The Tenth Circuit's decision constitutes an unwarranted intrusion into the administrative process. This is evident in light of the anomalous impacts of the Court's interpretation and the fact that the Commission, not the Tenth Circuit, is the agency charged by Congress with the administration of the NGPA.[6] Further, the Tenth Circuit's admission of such anomalies demonstrates that its order imposing the substitute interpretation does not meet the "reasoned decisionmaking" standard against which courts routinely measure decisions of the Commission.[7] In the circumstances here present, the Tenth Circuit had a duty to defer to the Commission's interpretation of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (*"Chevron"*).

3. The Tenth Circuit's decision is also inconsistent with the plain meaning of the statute. Violating well-established principles of statutory construction, the Tenth Circuit's interpretation of the NGPA assumes that when Congress used the phrase "could result in the highest price" it used the word "could" as synonymous with "would" or "will" as if the phrase reads "*will* result in the highest price." There is no support for such an interpretation of the statute.

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[6] As a hypothetical proposition, it seems compelling (all things being equal) that Congress should be called upon to correct an *agency's* misinterpretation rather than a *reviewing court's* misinterpretation, given the jurisdictional fact that Congress charged the agency with the duty to construe and execute the statute's provisions.

[7] *E.g.*, Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

The Tenth Circuit's conversion of "could" to "will" is inconsistent with other portions of the statute and does violence to the plain meaning of the statutory language. It also produces a result which is wholly at odds with Congress' objective to achieve *deregulation* of wellhead prices as reflected in NGPA Section 121.

4. The Tenth Circuit's decision should be reversed under this Court's decision in *Chevron*, *supra*, requiring judicial deference. Under *Chevron*, the Tenth Circuit was not free to adopt its own interpretation in place of the one chosen by the Commission. The Commission's findings reflect a reasonable reconciliation of NGPA Section 121 and Section 101(b)(5) with each other and with the basic statutory objective to balance gas supply and demand.

ARGUMENT

I. The Tenth Circuit's Interpretation Is Inconsistent with the Purpose and Legislative History of the NGPA.

The Commission, interpreting and applying NGPA Section 121, held that gas which is qualified in an NGPA category that has been deregulated and removed from Commission jurisdiction must be treated as such, even though the gas also has been qualified in an NGPA category which has not been price decontrolled. The reasonableness of the Commission's interpretation is clear against the backdrop of the NGPA, the provisions of the statute, and the ultimate goal of Congress to achieve a supply and demand balance of natural gas.

Prior to the NGPA, the Federal Power Commission (predecessor to the Commission) had been constrained under the NGA's standard to limit such prices to *cost-based* "just and reasonable" levels, even though those price levels tended to be below the prices dictated by the

market.[8] The Commission's inability to provide adequate wellhead price incentives above the cost-based NGA standard frustrated producer efforts to explore for and develop incremental gas supplies for interstate pipelines. Gas supplies were therefore naturally attracted to the unregulated intrastate markets and, during the 1970's, a severe gas shortage in the interstate market ensued.[9]

In response to this national crisis, Congress redefined and replaced the NGA cost-based standard with higher "just and reasonable" NGPA price ceilings for "first-sale" gas. Further, Congress provided for phased-in deregulation of those ceilings. Both the ceilings and the subsequent provisions for deregulation reflected Congress' ultimate goal, noted by this Court in *Transco*, *supra*, of using market forces to *balance* the supply and demand for natural gas:

> "[T]he NGPA reflects a congressional belief that a new system of natural gas pricing was needed to balance supply and demand.
>
> * * * *
>
> "* * * [Congress determined] that supply, demand, and the price of high-cost gas be determined by market forces. To the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market." [10]

The Commission's interpretation of NGPA Section 121 to deregulate dual-qualified gas is consistent with this overriding statutory objective. The Tenth Circuit's forced interpretation of the NGPA plainly is not.

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[8] *See generally*, Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 391-93 (1959).

[9] *See Mid-La II*, *supra*, 463 U.S. at 330-31 ("The interstate rates remained substantially below the unregulated prices available for intrastate sales, and the interstate supply remained inadequate.").

[10] *Transco*, *supra*, 106 S. Ct. at 716-17 (1986).

The Tenth Circuit insists that the Commission:

> "* * * has confused the ultimate purpose of the statute—'to assure adequate supplies of natural gas at fair prices,' *Transcontinental Gas Pipe Line Corp.*, 106 S.Ct. at 716—with one of several means chosen to accomplish that purpose—phased deregulation. * * * Incentive prices for difficult to produce gas are another means by which Congress sought to increase energy supplies. * * * We will not strain the plain meaning of § 101(b)(5) in order to serve a goal of deregulation that is itself only one of several means adopted to achieve the purposes of the NGPA." 813 F.2d at 1070-71; App. 20a-22a (footnote omitted).

However, the Commission was demonstrably not confused as alleged by the Tenth Circuit. As the Commission carefully explained:

> "The Commission recognizes that Congress had two major objectives in mind when it passed the NGPA in 1978. First, in the short term, it maintained a regulatory structure of price controls and, within that structure, provided incentives to encourage exploration and development of new reserves and, second, in the long term, it gradually substituted market forces for regulated prices by phasing in deregulation in 1985 and 1987. * * * The deregulation of certain categories of natural gas as provided in the NGPA is not in conflict with the goal of increasing energy supplies. Indeed, deregulation fosters that goal. Without question, phased deregulation was one of the primary methods utilized by Congress to increase energy supplies." App. at 108a (footnote omitted).

INGAA submits that the real problem is not with the Commission's reasoning but with the Tenth Circuit's failure to recognize the ultimate goal of the NGPA to balance gas supply and demand. This failure is evident from the Tenth Circuit's truncated quotation of this

Court's *Transco* opinion, quoted above. The complete thought of this Court, including the portion omitted by the Tenth Circuit (shown with emphasis) reads as follows:

> "The aim of federal regulation remains to assure adequate supplies of natural gas at fair prices, *but the NGPA reflects a congressional belief that a new system of natural gas pricing was needed to balance supply and demand.*" [11]

The Tenth Circuit's reading of *Transco* effectively reads the important words "adequate [gas supplies]" and "fair [prices]" out of the quote. The clear intent of Congress was to have the adequacy of gas supplies and the fairness of prices ultimately determined by market forces.[12] The Tenth Circuit's holding, in contrast, creates price floors as if the goal of the statute was solely to elicit incremental gas supplies, *i.e.*, regardless of price. Moreover, a price is manifestly not "fair" under this market-oriented statute if that price is *imposed* as a regulated price floor.

Again, the intent of Congress was to *balance supply and demand* by setting maximum lawful prices on one hand and, on the other, phasing out controls on new gas

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[11] *Supra*, 106 S. Ct. at 716.

[12] As this Court further noted in its *Transco* decision, Congress determined "that the supply, demand, and the price of high-cost gas [should] be determined by market forces." 106 S.Ct. 716-17.

A petition for *certiorari* recently filed in another case by the Shell Offshore producer group concurs:

> "While the Commission has authority to specify terms and conditions for transportation provided under Section 311, that authority cannot be read to undermine the clearly expressed congressional intent to prevent any regulatory interference with the free market pricing scheme set out in the NGPA. * * *" *Id.*, at 14. Similar statements appear elsewhere in that petition. *See*, Shell Offshore Inc., *et al.*, *Petitioners*, v. Associated Gas Distributors, *et al.*, *Respondents*, No. 87-——, dated December 14, 1987, at pp. 10-12, 15, 17-18.

supplies to allow market forces to determine the price. Yet basic economic principles hold that if prices are forced above market clearing levels, an *excessive* supply rather than an *adequate* supply will result. Certainly there is no reasonable basis for concluding that Congress intended to rectify the acknowledged and obvious market ordering problem of the pre-NGPA era with the opposite version of the same problem.

INGAA submits that Congress had no intent to force natural gas buyers to pay rates higher than those which would be dictated by the market. Had that been Congress' design, it surely would have established minimum, not maximum, prices. The NGPA ceilings are plainly maximum prices, not minimum prices.[13]

The Commission has sought to give full reign to market forces in its interpretation of the statute. In contrast, the Tenth Circuit would turn the NGPA into a price *support* scheme which would protect producers from downside risks and force gas consumers to pay above-market prices for their gas. Nothing in the language or legislative history of the NGPA supports such an interpretation or result.

II. The Tenth Circuit's Decision Produces Anomalous and Absurd Results.

The Tenth Circuit candidly admits that its interpretation of the NGPA produces unexpected and bizarre results. For example, the Court notes that its decision creates an

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[13] This fact is made very clear in Section 101(b)(9) which is directed to "maximum lawful price[s] under this title" and provides that, regardless of whether gas is regulated or deregulated, the price charged cannot exceed the contract price, even if that price is well below the allowable ceiling price. 15 U.S.C. § 3311 (b)(9). Thus, the statute expressly permits sellers and buyers of first-sale gas to contract for prices at less than the statutory maximums.

> "* * * anomalous situation [where] . . . producers seek the regulated ceiling price rather than the deregulated market price. * * * Therefore, § 101(b)(5) can have the unanticipated effect of operating as a price floor for producers. * * *" *Id.* at 1071; App. 23a.

The Court further concedes that in the case of contracts which require the parties to renegotiate the gas price in the event the gas is deregulated, the Court's ruling will create a "Catch 22" situation such that corrective action by Congress may be required. *Id.* at 1068, n. 11; App. 16a-17a. The "Catch 22" situation stems from the fact that typical contract renegotiation provisions are triggered only in the event of deregulation; yet, under the Tenth Circuit's interpretation the determination of whether the gas is deregulated cannot be made until there is a renegotiated price to be compared against the ceiling price. This admission alone eloquently signals the Tenth Circuit's unwarranted intrusion into the administrative process.

Even where there is no "Catch-22" situation, *e.g.*, the contract has no "typical" renegotiation provision, the Tenth Circuit's interpretation would effectively delegate the determination of which gas should be deregulated to private parties. The Tenth Circuit would empower the contracting parties to determine, through the structuring of their contract, whether the gas will be treated as regulated or deregulated.[14] The Commission, as the agency charged with enforcing the provisions of the NGPA, would be relegated to a role of examining and interpreting those dually-qualified gas contracts to de-

[14] Indeed, as the Court noted, in the case of contracts for dually-qualified gas which provide that the parties will renegotiate the contract price in the event of deregulation, the regulated price would always prevail. 813 F.2d 1069, n.11; App. 17a. By executing such a contract, the parties could totally thwart the operation of Section 121 of the NGPA.

termine what price would apply if the gas in question were deemed to be deregulated.[15] The Commission would then have to compare that deregulated price against the regulated price to determine which is higher, *i.e.*, to determine whether the gas should be treated as regulated or deregulated. The endlessness of the administrative burdens attending the Tenth Circuit's holding is apparent. Indeed, such a determination would have to be made for each contract on a monthly or more frequent basis.[16]

The NGPA, however, is structured with specific objective standards for determining whether gas qualifies as "first-sale" gas and, if so, in what category it falls. Thus, it specifies well spud dates, depth of wells, production rates, *etc.*, as controlling criteria. *See*, NGPA Sections 102 and 108, 15 U.S.C. §§ 3312 and 3318. As Congressman Dingell stated:

> "The FERC is intended to play an enforcement role with respect to the ceiling prices, not with respect to enforcement of private contracts *per se*. . . . [I]t is contemplated that FERC's implementation of the bill will be accomplished with minimal interference with contractual relationships." [17]

In contrast to this intended Commission role, the Tenth Circuit would convolute the statutory scheme for deregulation into one requiring an *expansion* of the Commission's regulatory oversight: the Commission must now become bogged down in a spate of proceedings involving the interpretation and enforcement of private contracts.

[15] "The contractual provision that 'could' result in the highest price at a particular moment will establish the applicable category under Section 101(b)(5)." 813 F.2d at 1069, App. 16a-17a.

[16] As the Tenth Circuit ruled, "[s]ection 101(b)(5) therefore requires a comparison of the applicable price for each category *at a particular moment*." 813 F.2d at 1068; App. 16a-17a.

[17] *Natural Gas Policy Act Information Service*, Para. 101:230, p. 3.

This Court has long held that interpretation of a statute often involves some leeway in ascribing meaning to particular words in order to avoid absurd results or a consequence which would thwart the obvious purpose of the statute. *United States v. Turkette*, 452 U.S. 576, 581 (1981), *citing Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965). Certainly, the Commission's interpretation of the NGPA is a reasonable and rational implementation of the intent of Congress and is consistent with the generally accepted meaning of the statutory language.

The anomalies resulting from the statutory interpretation imposed by the Tenth Circuit demonstrate that such substitute interpretation does not meet the "reasoned decisionmaking" standard against which courts routinely measure decisions of the Commission.[18] In the circumstances here present, the Tenth Circuit had a duty to defer to the Commission's interpretation of the statute. *Chevron, supra.*

III. The Tenth Circuit's Decision Is Inconsistent with the Plain Meaning of the Statute.

Another critical flaw in the Tenth Circuit's reasoning lies in its linchpin declaration that the Commission's interpretation of the word "'* * * 'could'—one that considers only the theoretical possibilities—renders § 101(b)(5) meaningless." 813 F.2d at 1068; App. 16a. The significance of this finding is that, without it, the Tenth Circuit could not have gone on to adopt and impose its own interpretation of NGPA Section 121 as a substitute for that adopted by the Commission.

Contrary to the holding of the Tenth Circuit, the Commission's reading of the word "could" in Section

[18] *E.g., Greater Boston Television Corp. v. Federal Communications Commission, supra.*

101(b)(5) is consistent with the statute's plain meaning, is clear and unambiguous, is meaningful, and does not render Section 101(b)(5) meaningless. This is evident from the words of the statute as well as the overall objective of the NGPA to achieve deregulation of most first-sale gas within the time schedule established in NGPA Section 121.

It is well established that where the statutory language is clear on its face, it is controlling.[19] The Tenth Circuit, however, neglected this rule and, in contrast to the Commission's consistent and reasoned interpretation of NGPA Sections 121 and 101(b)(5), adopted an arbitrary, forced, and capricious interpretation requiring an actual price comparison at any given moment of time, as if the phrase "could result in the highest price" said "*would* or *will* result in the highest price."

Producer Respondents suggest that "Congress would not have seized upon a subtlety so obscure as the Commission's current interpretation of 'could' had it intended that deregulated treatment must always apply to dual category gas eligible for decontrol."[20] But there is nothing obscure about the difference in meaning between the word "could", as used in NGPA Section 101(b)(5), and the words "will" or "would" which were not used in that section.

The Producer Respondents correctly note that the NGPA was a "closely negotiated . . . compromise [in-

[19] *E.g.* Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.")

[20] "Brief in Opposition to Petitions for a Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit" filed herein on October 30, 1987, at 11.

volving] . . . 18 months of legislative battles."[21] Given this lengthy history, there is no reason to believe that the words appearing in the statute were imprecisely chosen or used. Rather, that extended history suggests that the word "could" was used deliberately and that it was intended to convey its usual meaning.[22]

Moreover, an examination of the entire statute reveals that Congress was fully aware of the distinction between the words "could" and "would" or "will." For example, Congress in NGPA Section 102(c)(1)(C)(ii) provided for an exclusion from the definition of new onshore reserves, excluding a reservoir penetrated by an old well where "natural gas *could* have been produced in commercial quantities from such reservoir through such old well before April 20, 1977." 15 U.S.C. § 3312(c)(1)(C)(ii) (emphasis added). Clearly, the meaning of the word "could" in that provision of the NGPA is consistent with the Commission's interpretation of that word in Section 101(b)(5).[23] That is, it refers to a possibility, not a certainty or fact.

It is a well established rule of statutory construction that where a word is used in more than one place in a statute it should be construed to have the same meaning in each instance.[24] Application of that rule to this case

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[21] *Id.* at 11-12.

[22] Unless otherwise indicated, words should be given "their ordinary, contemporary, and common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979) (citations omitted).

[23] Indeed, any other reading of that provision would render it meaningless.

[24] *E.g.* Barnson v. United States, 816 F.2d 549, 554-55 (10th Cir. 1987); Firestone v. Howerton, 671 F.2d 317, 320 n.6 (9th Cir. 1982); United States v. Nunez, 573 F.2d 769, 771 (2nd Cir.), *cert. denied*, 436 U.S. 930 (1978). But see United States v. Stauffer Chemical Co., 684 F.2d 1174, 1184-85 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984), where the Sixth Circuit held that a term in a

leads to the conclusion that Congress did not use the word "could" as synonymous with "would" or "will."

This conclusion is reinforced by the fact that when Congress intended to refer to more than "possible" results, it used the word "will" or "would." For example, in Section 311(b)(7) of the NGPA, 15 U.S.C. § 3371, Congress provided that if the Commission's grant of sales authority under that section "would" produce specified impacts the Commission would be required to disapprove the application. In each instance, Congress used the word "would" as describing an actual impact resulting from a grant of such authority, and not simply one of several possible results as would have been the case if the word "could" had been used instead of "would".[25] Similarly, Congress used the word "will" in Section 504(b)(1), 15 U.S.C. § 3414(b)(1), to connote a definite result rather than a possible one.

In each instance noted above where Congress used the term "would" or "will" in the NGPA, substitution of the word "could" would have significantly altered the meaning of the particular statutory provision. This demonstrates beyond reasonable argument that Congress did not use those words synonymously in the NGPA.

As this Court has said, "[n]ormal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ . . . ." *Offshore Logistics, Inc. v. Tellentire*, 106 S.Ct. 2485, 2495 (1986). Congress clearly understood the difference in the meaning between the term "could" on the one hand and

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statute could have different meanings where a contrary holding would produce an absurd result. The Supreme Court affirmed on collateral estoppel grounds, and did not reach the merits of the case.

[25] Other instances where the term "would" is used in the same manner are found in Section 315(b)(2) and (3), 15 U.S.C. § 3375 (b)(2) and (3), and Section 503(c)(2), 15 U.S.C. § 3413(c)(2).

"would" or "will" on the other, and used each accordingly in the NGPA.

Moreover, there is no "compelling evidence" that Congress intended NGPA Section 101(b)(5) to be read in a manner that would thwart the deregulation goal explicitly mandated in NGPA Section 121. Yet, the import of the Tenth Circuit is to do just that.

Further, the reading of Section 101(b)(5) imposed by the Tenth Circuit frustrates the explicit statutory command of NGPA Section 121 that, on the dates specified, the Commission must deregulate gas which is qualified for deregulation under that section. It is ludicrous to interpret clear congressional intent to deregulate natural gas and to let the competitive forces of the market set prices as an intent to provide producers a security blanket of price supports if the market does not provide them with a price high enough to meet their satisfaction.

IV. The Tenth Circuit's Decision Should Be Reversed under This Court's Decision in *Chevron* Requiring Judicial Deference.

The Commission's interpretation of NGPA Section 121 and Section 101(b)(5) is entitled to judicial deference. In *Chevron*, *supra*, this Court explained that a court is not free to adopt its own interpretation in place of the one chosen by the agency. Rather, if the agency's

> "* * * choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' *United States v. Shimmer*, 367 U.S. 374, 383 * * * (1961).[26]

This Court has also held that the deference to be accorded to an agency's interpretation is strongest where,

[26] *Supra*, 467 U.S. at 844.

as here, the agency is carrying out its congressionally-imposed mandate.[27]

INGAA submits that the Commission's construction of NGPA Sections 121 and 101(b)(5) to deregulate gas which has been dually qualified should have been affirmed by the Tenth Circuit. The Commission's findings reflect a reasonable reconciliation of those statutory provisions with each other and with the basic statutory objective to balance gas supply and demand. As such, those findings should have been accepted by the Tenth Circuit under this Court's directive in *Chevron*.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Tenth Circuit below and affirm the interpretation of the NGPA which the Commission had found proper.

Respectfully submitted,

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[27] "* * * We have elsewhere held that we may not, 'in the absence of compelling evidence that such was Congress' intent . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.'" Permian Basin Area Rate Cases, 390 U.S. 747, 780." United States v. Southwestern Cable Co., 392 U.S. 157, 177-78 (1968) (additional citations omitted).

APPENDIX

1988
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
ACTIVE MEMBERSHIP

AlaTenn Resources, Inc.
Arkla, Inc.
Blue Dolphin Pipe Line Company
The Coastal Corporation
Columbia Gas Transmission Corp.
Consolidated Natural Gas Company
El Paso Natural Gas Company
Enron Corp.
Granite State Gas Transmission, Inc.
Great Lakes Gas Transmission Company
Kentucky West Virginia Gas Company
KN Energy, Inc.
Michigan Gas Storage Company
MidCon Corp.
Mountain Fuel Resources, Inc.
Pacific Gas Transmission Company
Pacific Interstate Company
Panhandle Eastern Corporation
SONAT, Inc.
Tenneco Gas Pipeline Group
Texas Eas ern Gas Pipeline Company
Texas Gas Transmission Corporation
Texas Oil & Gas Corporation
Transco Gas Company
United Gas Pipe Line Company
Valero Interstate Transmission Company
Valley Gas Transmission, Inc.
The Williams Companies

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INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

ASSOCIATE MEMBERS

Amoco Production Company
ARCO Oil and Gas Company
Atlanta Gas Light Company
The Brooklyn Union Gas Company
Chevron USA
Cities Service Oil and Gas Corporation
Conoco Inc.
Entex, Incorporated
Exxon Company, U.S.A.
John H. Hill
HNG Oil Company
Kerr-McGee Corporation
Kinsey Interests, Inc.
Laclede Gas Company
Lear Petroleum Exploration Company
Marathon Oil Company
Mewbourne Oil Company
National Fuel Gas Company
NUI Corporation
Oklahoma Natural Gas Company,
a Division of ONEOK Inc.
Phillips Petroleum Company
Shell Oil Company
Southern California Gas Company
Sun Exploration & Production Company
Texaco U.S.A.
Union Pacific Resources Company
Unocal Corporation